Manuel Frank Simon & Anor v Jean Sharin a/p DI Williams (Elizabeth Shirley Williams, intervener)

HIGH COURT (KUALA LUMPUR) — PROBATE PETITION NO S4–32–501 OF 2003
TENGKU MAIMUN J
30 NOVEMBER 2007

Succession — Probate — Testamentary capacity — Naive, gullible, easily influenced, depressed and withdrawn — Whether testator had testamentary capacity

Succession — Probate — Validity of will — Principles applicable — Whether deceased had testamentary capacity — Whether there is undue influence or coercion

By a will dated 7 October 1998, the testatrix appointed the petitioners as executors of her will and bequeathed her 1/3 share in a property to the petitioners and her niece one Henritta Victor in equal shares absolutely. The testatrix passed away on 2 December 2002 and the petitioners as executors of her estate filed a petition for the grant of probate of the said will. The caveator and the intervener, both were the daughters of the testatrix, objected to the petition on the ground that the second petitioner had influenced the testatrix to execute the said will in favour of the petitioners and Henritta Victor. The only issue before the court was whether the testatrix had executed the said will on her own free will and consent.

Held, allowing the petition:

(1) There was no evidence that the second petitioner had exerted undue influence or had coerced the testatrix in making the said will. The evidence merely showed that the second petitioner was indeed a senior family member and was frequently consulted by the testatrix on family matters (see para 14).

(2) The mere fact the testatrix was naïve, gullible and easily influenced and that she was depressed and withdrawn does not vitiate her testamentary capacity (see para 17).

(3) The second petitioner (PW1) testified that he came to know about the said will after the death of the testatrix. The solicitor who prepared the will (PW2) gave evidence that he had conversed with the testatrix and had asked her why she was not bequeathing anything to her daughters to which she replied that she was disappointed with them as they had treated her badly (see paras 6–7).

(4) Given the evidence that the second petitioner had no knowledge of the said will until the passing of the testatrix and given the evidence of PW2, the petitioners had proven the testamentary capacity of the testatrix. Further, the caveator and the intervener had not proven the element of influence on the part of the second petitioner (see para 17).

[Bahasa Malaysia summary

Melalui wasiat bertarikh 7 Oktober 1998, pewasiat telah melantik pempetisyen-pempetisyen sebagai wasi-wasi wasiatnya dan telah mewasiatkan 1/3 bahagian daripada hartanya kepada pempetisyen-pempetisyen dan seorang anak saudara perempuannya iaitu Henritta Victor untuk bahagian sama kesemuanya. Pewasiat telah meninggal dunia pada 2 Disember 2002 dan pempetisyen-pempetisyen sebagai wasi-wasi kepada harta pusaka si mati telah memfailkan petisyen untuk perintah probet wasiat tersebut. Pengkaveat dan pencelah, kedua-duanya merupakan anak perempuan pewasiat, menentang kepada petisyen atas alasan bahawa pempetisyen kedua telah mempengaruhi pewasiat untuk melaksanakan wasiat tersebut kepada pempetisyen-pempetisyen dan Henritta Victor. Hanya terdapat satu isu di hadapan mahkamah iaitu sama ada pewasiat telah melaksanakan wasiat tersebut atas ikhtiarnya sendiri dan telah mengizinkannya.

Diputuskan, membenarkan petisyen:

(1) Tiada ada sebarang bukti bahawa pempetisyen kedua menggunakan pengaruh tak wajar atau telah memaksa pewasiat dalam membuat wasiat tersebut. Keterangan telah menunjukkan bahawa pempetisyen kedua sememangnya ahli keluarga yang paling kanan, dan juga selalu dirujuk oleh pewasiat berkaitan hal-hal keluarga (lihat perenggan 14).

(2) Fakta bahawa pewasiat adalah terlalu lurus, mudah terpedaya dan mudah dipengaruhi dan bahawa beliau adalah tertekan dan dipinggirkan tidak merosakkan keupayaannya untuk membuat wasiat (lihat perenggan 17).

(3) Pempetisyen kedua (PW1) memberikan keterangan bahawa beliau mengetahui berkenaan dengan wasiat tersebut selepas kematian pewasiat. Peguamcara yang telah menyediakan wasiat (PW2)

memberikan keterangan bahawa beliau telah bercakap dengan pewasiat dan telah bertanyakannya mengapa beliau tidak mewasiatkan apa-apa kepada anak-anak perempuannya yang mana beliau menjawab bahawa beliau kecewa dengan mereka kerana mereka telah melayannya dengan teruk (lihat perenggan 6–7).

(4) Berdasarkan keterangan bahawa pempetisyen kedua tidak mempunyai pengetahuan kepada wasiat tersebut sehinggalah pewasiat meninggal dunia, dan berdasarkan kepada keterangan PW2, pempetisyen-pempetisyen telah membuktikan keupayaan pewasiat untuk membuat wasiat. Selanjutnya, pengkaveat dan pencelah tidak membuktikan terdapat elemen pengaruh di pihak pempetisyen kedua (lihat perenggan 17).]

Notes

For cases on testamentary capacity, see 11 *Mallal's Digest* (4th Ed, 2005 Reissue) paras 2568–2579.

For cases on validity of will, see 11 *Mallal's Digest* (4th Ed, 2005 Reissue) paras 2585–2593.

Cases referred to

Lee In Chin @ Lee Teck Seng & Ors v Gan Yook Chin & Anor [2003] 2 MLJ 97 (refd)

Sethambal d/o Doraiappah & Anor v Krishnavani a/p Muniandy [2004] 2 AMR 29 (refd)

Ravichandran (James Culaz with him) (K Mano & Associates) for the plaintiff.
Sujatha (Shamiah KE Ng & Siva) for the caveator.
Raman Veloo (Raman Velu & Co) for the intervener.

Tengku Maimun J:

[1] The late Mr Devanbu Isaac Williams had executed a will dated 22 May 1972 in which his wife, Madam Grace William ('the testatrix') and Elizabeth Shirley Williams ('the intervener') were jointly appointed as the Executors and Trustees for the estate. The estate of the late Mr Devanbu Isaac Williams consisted of the land held under HS(D) 32299 No PT 1095, Mukim Kuala Lumpur bearing the address No 62, Jalan Balau Damansara Heights Kuala Lumpur (the said property) and by the abovementioned will the late Mr Devanbu Isaac Williams had bequeathed all of his estate to the testatrix, the intervener and Jean Sharin a/p DI Williams (the caveator) in equal one third shares absolutely. The caveator and the intervener are the daughters of the testatrix and the late Mr Devanbu Isaac Williams. The first petitioner who

had since passed away is the brother of the testatrix whereas the second petitioner was the brother in law of the testatrix and a practicing Christian priest in India.

[2] By a will dated 11 July 1986 the testatrix had appointed the caveator as the Executor and Trustee for her estate and the caveator was also named the beneficiary of the said estate. Vide a will dated 7 October 1998 (the said will) the testatrix appointed the petitioners as executors of her will and bequeathed her 1/3 share in the said property to the petitioners and her niece one Henritta Victor in equal shares absolutely.

[3] The testatrix passed away on 2 December 2002 and the petitioners as executors of her estate filed a petition vide encl 1 for the grant of probate of the said will. The caveator and the intervener objected to the petition on the ground that the second petitioner had influenced the testatrix to execute the said will in favour of the petitioners and Henritta Victor. The only issue before the court is whether the testatrix had executed the said will on her own free will and consent.

[4] In *Lee In Chin @ Lee Teck Seng & Ors v Gan Yook Chin & Anor* [2003] 2 MLJ 97 Gopal Sri Ram JCA said at p 113:

> It is settled law where the validity of a will is challenged, the burden of proving testamentary capacity and due execution lies on the propounder of the will as does the burden of dispelling any suspicious circumstances that may surround the making of the will. However, the onus of establishing any extraneous vitiating element such as undue influence, fraud or forgery lies on those who challenge the will — in this case the plaintiffs.

[5] At p 121 of the judgment, the learned JCA said:

> As to what is meant by testamentary capacity, our courts have always accepted the following statement by Cockburn CJ in *Banks v Goodfellow* [1980] LR 5 QB 549 as representing the law on the subject.... It may thus be seen that what the law primarily looks for as vitiating testamentary capacity is mental disorder or insane delusion. Mere bodily ill-health or imperfect memory is insufficient.

[6] The second petitioner (PW1) testified that he came to know about the said will after the death of the testatrix from the office of K Mano and Associates, the firm of solicitors who had prepared the said will and the will was brought back by Henritta Victor to India after she visited Malaysia for the funeral of the testatrix. He further testified that prior to that the testatrix had never discussed the distribution of her property with him. During cross examination he maintained that he had no prior knowledge of the will and that it came as a surprise to him that the testatrix appointed him the executor.

[7] The solicitor who prepared the will (PW2) gave evidence that he had conversed with the testatrix and had asked her why she was not bequeathing anything to her daughters to which she replied that she was disappointed with them as they had treated her badly.

[8] The caveator and the intervener testified that there were a lot of phone calls exchanged between the second petitioner and the testatrix prior to her death and that the testatrix was depressed and withdrawn having suffered from cancer. It was also in evidence that the testatrix had high regards towards pastors and their opinions. Evidence was also led that in January 1998 the testatrix had visited India and had stayed in India for four months. Both the caveator and the intervener testified that the testatrix was a person that could be easily influenced.

[9] Learned counsel for the petitioners submitted that with the evidence of PW2 the petitioners have proven at a prima facie level the testamentary capacity of the testatrix. Learned counsel cited the case of *Sethambal d/o Doraiappah & Anor v Krishnavani a/p Muniandy* [2004] 2 AMR 29 where at p 44 Abdul Hamid bin Mohamed JCA (now Chief Justice) said:

> There is the evidence of DW 4 that he had asked the deceased specifically why he wanted to leave the house to his mother. The reason is because it was the mother who had paid the deposit for the house and that was the only amount paid. The fact that the mother had paid for the deposit for the house was corroborated by DW1. Unfortunately, from the judgment, the learned judge, failed to consider this factor at all.
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> The other factor that the learned judge appears to have failed to consider is that the will was prepared by a solicitor who gave evidence at the trial. He is DW4. To us DW4's evidence is the most important of all. He is an advocate and solicitor, he had no personal interest in the matter and he gave evidence in court.

[10] Learned counsel further submitted that the petitioners have proven at a prima facie level the testamentary capacity of the testatrix and the burden therefore shifted upon the caveator and the intervener to show the testamentary incapacity of the testatrix. It was the submission of learned counsel for the petitioners that the caveator and the intervener had failed to adduce a single piece of evidence of any form of influence on the mind of the testatrix other than the testimony of alleged depression of a woman suffering from cancer.

[11] For the caveator, learned counsel contended that the phone calls exchanged between the second petitioner and the testatrix prior to her death, the very close relationship between the testatrix and the second petitioner and the last visit of the testatrix to India which was six months prior to the

execution of the said will raised suspicious circumstances as to the validity of the will and the testamentary capacity of the testatrix.

[12] Learned counsel for the intervener had similarly submitted that the facts preceding and leading to the purported execution of the said will cast suspicious circumstances surrounding the said will.

[13] Having scrutinized the evidence of the second petitioner, the caveator and the intervener and having considered the submissions of learned counsel for the respective parties, it is my view that there is no evidence that the testatrix lacked the mental capacity to make a will.

[14] The caveator and the intervener had alleged that the second petitioner had influenced the testatrix in making the said will. However as submitted by learned counsel for the petitioners there is no evidence that the second petitioner had exerted undue influence or had coerced the testatrix in making the said will. The evidence merely shows that the second petitioner was indeed a senior family member, and was frequently consulted by the testatrix on family matters. This was evidenced by his testimony that he had attempted to reconcile the family as the relationship between the caveator and the intervener had been strained, there being disputes amongst them as regards the distribution of rental of the said property.

[15] The intervener confirmed the fact that the relationship between her and the testatrix was strained and that was the reason why the testatrix had contacted the second petitioner to help out with the family issues. DW3 who is the husband of the intervener gave evidence that at all times the second petitioner was trying to seek amicable solutions and that his intention was to heal family relationship which had gone bad because of the transactions in the said property.

[16] Apart from the fact that PW1 attended a meeting which was held to resolve the dispute and to extend his advise in trying to reconcile the family there was no evidence that he had influenced the testatrix in making the said will. In fact the caveator gave evidence that in the meeting the second petitioner had advised that the said property be sold.

[17] As regards the testatrix's stay in India, there was also no evidence to show that during the stay, the second petitioner had coerced or influenced the testatrix. As for the telephone calls, again there is no evidence to suggest that during those conversations, the second petitioner had coerced or influenced the testatrix to execute the said will. The mere fact that the testatrix was naïve, gullible and easily influenced and that she was depressed and withdrawn does not in my view vitiate her testamentary capacity. Given the evidence that the

second petitioner had no knowledge of the said will until the passing of the testatrix, and given the evidence of PW2, I am of the view that the petitioners had proven the testamentary capacity of the testatrix. Further, I am of the view that the caveator and the respondent had not proven the element of influence on the part of the second petitioner. Surely if the second petitioner had wanted to influence the testatrix in making the said will and to bequeath the said property to him, he would not have advised the family to sell the said property. In the circumstances, encl 1 was allowed with costs.

Petition allowed.

Reported by Brendan Navin Siva